IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 6 OF 2007

Mr. Diago Fernandes,
major of age,
Residing at H.No. 456,
Perxete, Guirim,
Bardez-Goa. .... Petitioner

V/s.

1. Mr. P.K. Vijayan,
major of age,
residing at 156,
Ranghavi Estate,
Dabolim-Goa.

2. State of Goa,
through Public Prosecutor,
Panaji-Goa. .... Respondents

Mr. A.N.S. Nadkarni, Advocate for the Petitioner.
Mr. M.S. Sonak, Advocate for Respondent No.1.

CORAM : N.A. BRITTO, J.

DATE : 31st AUGUST, 2007

ORAL JUDGMENT :

Challenge in this Revision Petition is to the judgment dated 21/12/2006 of the learned ASJ (Additional Sessions Judge, Margao) upholding the conviction and sentence of the accused under Section 138 of the Negotiable Instrument Act, 1881 (Act, for short) imposed by the learned JMFC, Vasco da Gama by judgment dated 10/07/2006.

2. The parties hereto shall be referred to in the names as they appear in the cause title of complaint case no. 45/OA/NIA/05/A.

3. The case of the complainant (Respondent No.1 herein) was that the accused was known to him as he was residing in the neighbourhood of the house of the complainant at the Defence Colony, Porvorim, Goa, and that at the request of the accused, the complainant had advanced to the accused on 24/04/2002 a loan of Rs. 15 lakhs and towards the repayment of the said loan and interest due thereon the accused had issued to the complainant cheque bearing no.114860 for Rs. 24,33,702/- drawn on Vijaya Bank, Mapusa and when the complainant presented the said cheque for payment through his banker i.e. Centurion Bank, Vasco, to the bankers of the accused for payment, the bankers of the accused informed that the account of the accused was closed and the complainant received the said intimation on 15/12/2004. As per the complainant, he issued a notice dated 17/12/2004 by registered post A.D. demanding the amount of the said dishonoured cheque alongwith bank charges and postal costs and sent copy of the said notice to the accused under certificate of posting to the last known address of the accused which was his permanent residence but the notice sent by registered post returned stating that the accused was out of station. As per the complainant, the said cheque was issued by the accused towards the discharge of the debt owed by him to the complainant. The complainant, therefore, filed the complaint on

12/01/2005 and in support of the complaint initially examined his attorney/PW1, as the complainant was on board the ship and, thereafter, by an application dated 28/10/2005 and with no objection of the accused and upon the order of the Court, examined himself/PW2. The accused also examined himself in support of his defence.

4. Three points have been raised in this Revision Petition on behalf of the accused.

5. The first is that the complainant was not entitled to recover the debt, if any, in terms of the Goa Money Lenders Act, 2001 and therefore the complaint under Section 138 of the Act was not maintainable. Counsel on behalf of the accused has referred to certain provisions of the Goa Money Lenders Act, 2001. Section 2(k) of the said Goa Money Lenders Act, 2001 defines the expression "loan" to mean an advance at interest, whether of money or in kind, but does not include a deposit of money or other property in a government post office bank or in any other bank or in a company or with a Cooperative Society. Section 2(1) defines "money-lender" to mean

(i) an individual; or
(ii) an undivided Hindu Family; or
(iii) a company; or
(iv) an unincorporated body of individuals,

who or which-

(a) carries on business of money-lending in the State; or does any

activity of lending of any finance;

(b) has his or its principal place of such business in the State, and includes, a pawn-broker but does not include-
(i) Government,
(ii) a local authority
.....etc.

Section 2(b) defines "business of money-lending" to mean the business of advancing loans whether in cash or kind and whether or not in connection with or in addition to any other business.

6. The Goa Money Lenders Act, 2001 was enacted to make better provisions for the regulation and control of transaction of money-lending in the State of Goa and Section 14 thereof provides for stay of suits by a money-lender not holding a licence and subsection (1) thereof provides that no court shall pass a decree in favour of a money-lender in any suit to which this Act applies, unless the court is satisfied that at the time when the loan or any part thereof, to which the suit relates was advanced, the money-lender held a valid licence, and if the court is satisfied that the money-lender did not hold a valid licence, it shall dismiss the suit.

7. Admittedly, the complainant had given to the accused a sum of Rs. 5 lakhs and presumably by DD No. 142694 dated 5/04/2002 and as stated by the complainant/PW2 the accused had returned the same to enable the complainant to give the loan of Rs. 15 lakhs. The complainant has also stated

that no interest was charged by him on the said sum of Rs. 5 lakhs lent by him to the accused and therefore it would be obvious that the said sum of Rs. 5 lakhs paid by the complainant to the accused would not qualify to be termed as a loan as it did not carry any interest, as defined by Section 2(k) of the Goa Money Lenders Act, 2001. That apart, the complainant/PW2 had categorically stated that he was not a money lender to which there was not even a suggestion put to the contrary. A solitary loan cannot make a transaction into a business of money lending. It is well said that one swallow does not make a summer. Likewise, a solitary loan cannot make a person a money lender or a person doing the business of money lending. In the circumstances, the contention that the loan of Rs. 15 lakhs advanced by the complainant to the accused was hit by the provisions of Goa Money Lenders Act, 2001, has got to be rejected.

8. The second point is as regards notice. As per the complainant, the accused was residing at 225, Defence Colony, Porvorim, Goa, while according to the accused he was residing at House No. 456, Perxete, Guirim, Bardez-Goa and that he had not received any statutory notice as alleged by the complainant. In support of the said plea, the accused produced his passport issued on 13/11/1996 and a ration card presumably also issued in the year 1996, for it was issued for the years 1996 to the year 2000. The learned trial Court observed that Exhibit 24 colly, the said demand notice, was sent

by the complainant by registered post AD within fifteen days of the dishonour of the said cheque and thereby the complainant had complied with the provisions of Section 138 of the Act. The learned trial Court also observed that the notice of demand was sent admittedly on the address of the accused at the Defence Colony, Porvorim, which according to the accused was a wrong address. The learned trial Court held, and in my view rightly, that the defence of the accused that he was residing at Guirim was proved false by two documents namely the wakalatnama executed by the accused in favour of his advocate at Exhibit 14 and the bond executed by the accused at Exhibit 15. The learned trial Court observed that the wakalatnama was admitted by the accused in his cross-examination which according to the accused was prepared under his instructions. The address mentioned in the said wakalatnama is at 225, Defence Colony, Sainik Housing Co-operative Society, Porvorim, Goa and on bringing the said fact to his notice in the course of cross-examination, the accused had pushed the blame on his lawyer and therefore the said document showed that the accused had come up with the false plea. The learned trial Court also observed that in the personal bond, the accused had given his address as 225, Defence Colony, Sainik Housing Co-operative Society, Porvorim, Goa and on being questioned about the same, the accused had conveniently tried to push the blame on his junior lawyer and the said two documents of which the accused himself was the author defeated his plea that he was not residing at the Defence Colony,

Porvorim, Goa. The trial Court also noted, and in my view rightly, that the summons issued by the Court were served upon the accused at his address at the said Defence Colony, Porvorim, Goa and had he not been residing at the said address, the police could not have served the summons on the accused at that address. The learned trial Court also observed that the accused had come with an explanation that the summons were served by the police officer who came in his search at Guirim but the accused had admitted that the police officer was attached to Porvorim police station and therefore the accused was caught on the wrong foot and thus had miserably failed to substantiate his defence. The trial Court therefore rejected the contention of the Counsel of the accused that the notice was sent to the accused on incorrect address and therefore service of summons was bad could not be accepted. Here, it may also be noted that the accused had admitted in his cross-examination that Village Guirim came within the jurisdiction of Mapusa police station while the Defence Colony, Porvorim, came within the jurisdiction of Porvorim police station and therefore it is obvious that the accused was indulging in falsehood that the police officer attached to Porvorim police station had come with the summons to be served upon him at Guirim. The accused also did not know what was the present house number of his said Guirim residence and that again makes it obvious that the accused is not residing at the said address at Guirim, for long. It also may be noted that the registered notice was returned with the postal endorsement that the accused was out of station.

The notice was not returned with the endorsement that the address of the accused was not known or the addressee had left the station. The inference to be drawn from the said endorsement is that the accused was otherwise residing at the given address but was absent when the postman went to effect service. There is also another document produced by the complainant which further falsifies the plea of the accused i.e. the promissory note dated 24/04/2002 executed by the accused and his wife Carla Fernandes which again clearly mentions the address of the accused at the said Defence Colony, Porvorim, Goa. Learned Counsel on behalf of the accused referring to ***C.C. Alavi Haji V/s. Palapetty Muhammed & Anr. (2007 AIR SCW 3578)*** contends that the accused was entitled to rebut the presumption of service of notice that the letter was never tendered to the accused and in this context particular reference is made to the last part of para 15 of the learned judgment. It reads as follows:

> "It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends."

Learned Counsel on behalf of the accused has further referred to the attorney's evidence and has submitted that the attorney himself had admitted that since the accused did not receive the notice as he was out of station it

was not possible for him to know that the notice was sent by Advocate Shetye on behalf of the complainant.

9. On behalf of the complainant, learned Counsel points out that the accused did not receive the notice is a factual situation but in law the accused is presumed to have received the said notice once the complainant sent the same at the correct address of the accused, and, I am entirely in agreement with the contention of the learned Counsel on behalf of the complainant. In my view, what the complainant's attorney conveyed by the said statement (at page 43 of the paper book) is that the accused had not actually received it, but law presumes valid service the moment it is sent by registered post at the correct address of the accused. In ***The Vasco Urban Co-op. Credit Society Ltd. V/s. Mrs. Shobha D. Korgaonkar (2005 (1) Goa L.R. 452)*** reference was made to the case of ***M/s. Madan & Co. V/s. Wazir Jaivir Chand (1989 (1) SCC 264)*** on which reliance has now been placed by learned Counsel on behalf of the complainant. In that case the proviso to Section 12(3) of the J & K Houses and Shops Rent Control Act, 1966 insisted that before any amount of rent could be said to be in arrears, a notice had to be served through post and the Apex Court observed that all that a landlord could do to comply with this provision is to post a prepaid registered letter (acknowledgment due or otherwise) containing the tenant's correct address. The Apex Court observed that once he does this and the letter is delivered to the post office, he has no

control over it. It is then presumed to have been delivered to the addressee under Section 27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorized by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by the addressee, but the difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorized to receive the letter and all that he can then do is to return it to the sender. The Apex Court ultimately held that the word "served" had to be reasonably, effectively, equitably and practically interpreted to mean as "sent by post" correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter.

10. The Apex Court in ***C.C. Alavi Haji*** (supra) has approved the view earlier held by it in ***K. Bhaskaran V/s. Sankaran Vaidhyan Balan and another (1999 (7) SCC 510)*** and ***D. Vinod Shivappa V/s. Nanda Belliappa*** case ***(2006 AIR SCW 2757)***. In ***K. Bhaskaran's*** case (supra) it was held that the principle incorporated in Section 27 of the General Clauses Act, 1897, could profitably be imported in a case under Section 138 of the Act and once the sender dispatches the notice by post with the correct address written on it, then it can be deemed to have been served on the sendee unless he proves that

it was not really served and that he was not responsible for such non-service. The said presumption of service was rightly drawn against the accused by both the Courts below, in the facts and circumstances of the case. The said presumption in terms of Section 27 of the General Clauses Act could not be displaced by mere word of the accused or his self serving statement and the accused having failed to prove that the address where the notice was addressed was not his correct address, the accused is deemed to have been served with the said notice. The said factual statement as conceded by the complainant's attorney that the accused had in fact not received the notice would not enure to the benefit of the accused for the purpose of rebutting the said presumption.

11. In ***C.C. Alavi Haji*** (supra) the Apex Court has also affirmed the earlier views held by it that due service has got to be presumed when a notice is sent by registered post and is returned with postal endorsement “refused” or “not available in the house” or “house locked” or “shop closed” or “addressee not in station”. The case at hand is covered by endorsement similar to the last. The complainant/PW2 also categorically stated that in addition to the registered notice he had also sent a copy of it under certificate of posting at the same address which was not received back by him. There is no specific reference made by the accused to this copy of the notice and there is no reason why factual presumption that the accused received the copy sent under

certificate of posting, since it was not returned back, could not be drawn against the accused. Either way, there is therefore no merit in the submission raised on behalf of the accused that no notice was served upon the accused as required under Section 138(b) of the Act.

12. Next, Counsel on behalf of the accused contends that the complainant did not state in his complaint as to discharge of which liability, the accused had issued the cheque. Counsel further contends that the accused had proved that he had no business transactions with the complainant and had also received no money from the complainant and thus has rebutted the presumption arising from Section 139 of the Act. Counsel further submits that he signed the cheque because of the pressure of his wife. It is also contended that the complainant came with the case that the money was advanced to the accused but failed to prove the same, as according to the complainant himself the sum of Rs. 15 lakhs was advanced by the complainant to M/s. C.R. & Company in which the wife of the accused was the partner and M/s. Oasis Wines owned by the mother-in-law of the accused. Learned Counsel further submits that there was no agreement between the complainant, the accused and the said persons to whom the money was advanced and unless there was such an agreement the accused could not be penalized for giving a cheque in payment of a debt owed to the complainant by some other parties and in this context learned Counsel has placed reliance

on a decision of this Court in the case of ***Hiten Sagar and another V/s. IMC Ltd. and another (2001 (3) Mh.L.J. 659)*** wherein this Court observed that the expression "any liability" occurring in the section only mean that any kind of liability of the drawer, and not any other's liability, unless the payee, the drawer and the original debtor entered into any agreement to that effect. This Court also observed that on a reading of Section 138 of the Act, it was clearly spelt out that the cheque must be drawn for discharge of the liability of the drawer of the cheque and if he has drawn a cheque for the discharge of the liability of another person without creating any document, it will not and it would not come under Section 138 of the Act.

13. Admittedly, the issuance of the cheque in question by the accused in favour of the complainant is not disputed but what is stated by him was that he was compelled to sign a blank cheque by his wife. Likewise, it was stated by the accused that his wife had informed him that the complainant had threatened her and his wife had compelled him to sign a demand pronote dated 24/04/2002. Here it may be noted that the demand promissory note, as already seen is dated 24/04/2002 and the cheque in question is dated 14/12/2004 and not only that the said pronote was signed by the accused as well as his wife. However, in his cross-examination, he stated that when he signed the pronote he had only signed a blank stamp promissory note and nothing was written on the same before he had signed the same. In further

cross-examination he admitted that it is the same note which was referred to by him in para 17 of his affidavit and further stated that when his wife made him to sign on the said stamp paper which was blank she did not tell him that it was being converted into a promissory note and she also did not tell him for what purpose his signature was being obtained on the said stamp paper. He admitted that neither he nor his wife had lodged any police complaint against the complainant for threatening his wife with dire consequences. He was again asked whether he signed on the stamp paper on which there was nothing typed under compulsion of his wife without any date, why this fact was not reflected in the affidavit in evidence, and, he answered stating that he could not give an answer to the said question. When the cheque in question was shown to the accused he admitted that he had given a signed cheque to his wife but he could not say whether it is the same cheque. As already stated the accused had given the cheque in question to the complainant and all that he had stated in his examination in chief was that he was compelled by his wife to sign the same and likewise he had stated the same thing in relation to the pronote executed by him and his wife on 24/04/2002 and obviously such statement on the part of the accused after a long silence, and without taking any action by him, could not have been accepted in support of the plea taken by the accused. The learned trial Court had observed, and, in my view rightly, that the accused had failed to prove that his wife had compelled him to sign the demand pronote and the blank cheque or that he

was not aware that the said cheque was given by his wife to the said complainant and thus the accused had failed to rebut the presumption arising out of Section 139 of the Act. Likewise, the learned ASJ had observed and, in my view rightly, that the accused had not disputed his signature on the subject cheque but had sought to carve out a case that his wife was instrumental in procuring his signature, on being pressurized by the complainant, but surprisingly the accused did not examine his wife to substantiate such a claim nor the accused had filed any complaint to the police in respect of the threats allegedly given by the complainant to his wife and such a complaint to a material extent would have supported his case or brought that of the complainant under a cloud that the cheque issued by him was not for consideration thereby rebutting the presumption available in favour of the complainant under Section 139 of the Act.

14. It is now well settled that the presumption available under Section 138 and 139 of the Act are mandatory and the burden of proving that there was no existing debt or liability was on the accused and this the accused had to discharge at the trial. In other words, the onus to prove that the cheque was issued by the accused without consideration was on the accused and though the said onus may not be as onerous as the general burden which is always on the prosecution, that onus had to be discharged by balance of probabilities like in civil proceedings. As observed by the Apex Court in the case of

Hiten P. Dalal V/s. Bratindranath Banerjee (2001 (6) SCC 16) the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man". No person of prudence would believe the accused that the accused gave the subject cheque to the complainant on being pressurized by his wife unless of course there were some other attending circumstances, or some other material to substantiate the said plea. This was a case where the accused had failed to discharge the presumption that the subject cheque was issued without consideration or that it was not issued in whole or in part payment of a debt or other liability.

15. No doubt the complainant stated in his complaint as well as in his affidavit in evidence that he had advanced the loan of Rs. 15 lakhs to the accused when in fact the explanation subsequently given by the complainant is that the said 15 lakhs were disbursed by the complainant i.e. to say Rs. 5 lakhs by draft in favour of M/s. Oasis Wines belonging to the mother-in-law of the accused and Rs. 10 lakhs by draft to M/s. C.R. & Company in which his wife was a partner. In my view, there is no contradiction in the case of the complainant at all, though a solitary statement in the evidence of the complainant (at page 59 of the paper book) was brought to my notice to the

effect that the complainant had stated that he had not given demand drafts at the request of the accused to M/s. C.R. & Company and M/s. Oasis Wines. The said statement could not be read in isolation but had to be read in the light of the evidence given by the complainant/PW2 as a whole and the documents produced by him. At the cost of repetition, it may be stated that the complainant did not specifically state in his complaint that the loan of Rs. 15 lakhs was disbursed by the complainant to the said M/s. C.R. & Company and M/s. Oasis Wines but had only stated that he had advanced the loan of Rs. 15 lakhs in favour of the accused. As far as this last aspect is concerned, the Apex Court in ***M.M.T.C. Ltd. and anr. V/s. Medchl Chemicals and Pharma (P) Ltd. and anr. (2002 (1) SCC 234)*** has stated that there is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they had to discharge in the trial. The evidence of the complainant/PW2 when read as a whole and in the light of two formidable documents produced by him namely the certificate dated 16/12/2005 (Exhibit 34) and the pronote signed by the accused and his wife dated 14/12/2004 clearly show that the complainant on the basis of a fixed deposit held by him with Centurion Bank of Punjab Ltd. had taken a loan of Rs. 15 lakhs on 24/04/2002 and the said money obtained on loan was disbursed by two demand drafts dated 24/04/2002 in the sum of Rs. 10 lakhs in favour of M/s. C.R. & Company and Rs. 5 lakhs in favour of

M/s. Oasis Wines and the accused and his wife had taken over the said liability of repayment of the said loan by executing the said pronote dated 24/04/2002 for a sum of Rs. 15 lakhs with interest at the rate of 16% with quarterly rests.

16. The judgment of this Court in the case of ***Hiten Sagar & anr.*** (supra) would be inapplicable to the facts of this case for the reasons more than one. Firstly, the said ex-parte judgment will not apply to the facts of this case, because as already stated it is the accused and his wife Carla Fernandes who had taken over the liability of the disbursement of the loan to the said M/s. C.R. & Company and M/s. Oasis Wines by execution of the pronote and had promised the complainant to pay on demand the said sum of Rs. 15 lakhs with interest and the accused had issued the subject cheque in favour of the complainant towards the payment of the same. Secondly, the said judgment has got to be considered as per incurrium in that it does not take into consideration the provisions of Section 139 of the Act as the aforesaid provision was not brought to its notice. It is also not in tune with the observations of the Apex Court in ***I.C.D.S. Ltd. V/s. Beemna Shabeer & Anr. (2002(4) All.M.R. 270 (S.C.))*** wherein the Apex Court stated thus: "The legislature had been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well (emphasis supplied)."

> "The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embagro in the matter of application of the provisions of Section 138 of the Act : 'Any cheque' and 'other liability' are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature."

It is now well settled that the presumption under Section 139 of the Act is mandatory and admits of no exceptions. One cannot lose sight of the object why the said provisions were incorporated in the Act. In ***Goa Plast (P) Ltd. V/s. Chico Ursula D'Souza (2004 (2) SCC 235)*** the Apex Court had stated thus:

> "The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee."

17. Section 138 of the Act deals with a cheque drawn by a person "for the

discharge, in whole or in part, of **any debt or other liability**". The section does not say that the cheque should have been drawn for the discharge of any debt or other liability of the drawer towards the payee. If the intention of the Parliament was otherwise the words "of any debt or other liability" would have been further qualified by adding the words "of the drawer". Section 139 of the Act which creates a mandatory legal presumption again uses the words "for the discharge, in whole or in part, of any debt or other liability" which only means that the debt or other liability may be due from any person and it is not necessary that the debt or other liability should be due from the drawer alone. In other words, the expression "any debt or liability" both in Section 138 as well as in Section 139 of the Act would include a cheque drawn by one person towards a legal enforceable debt or liability of another person.

18. The above view finds support in ***Krishna Bai V/s. Arti Press (1992 (2) Ker LT 40), Alexander V/s. Joseph Chacko (1994 (1) Crimes 388)*** and ***P.R. Shankar Rao V/s. Joseph and Joseph Regis Kalingarayar (2001 Cr. L.J. 2392)***.

19. The facts proved by the complainant and the documents produced by him clearly show that although the loan was actually disbursed to M/s. C.R. & Company and M/s. Oasis Wines, the liability to repay the same was taken over by the accused and his wife and it is towards this liability that the

accused had issued the cheque in question. Thus the accused had failed to discharge the onus that the cheque in question was issued without there being any debt or liability.

20. In view of the above, I find there is no merit in this Revision. Consequently, the same is hereby dismissed.

N.A. BRITTO, J.

NH/-